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No. 1245

In the Supreme Court of the United States

OCTOBER TERM, 1967

IN RE LORING J. WHITESIDE, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN OPPOSITION

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Petitioner was graduated from the Harvard Law School in 1911 and was admitted to the New York bar in 1913 (Pet. App. 2, p. A–15). He practiced law in New York until 1921, when he moved to Connecticut. He did not become a member of the Connecticut bar but, in 1964, was admitted to the bar of the United States District Court for the District of Connecticut (Pet. App. 2, p. A–15, A–16).

During several years of litigation in the Connecticut courts,[1] the plaintiffs in the case of *Tkaczyk* v. *Gallagher*, 259 F. Supp. 584 (D. Conn.), had been informally advised by petitioner on how to proceed in their actions to require the husband of their deceased daughter to bury her remains instead of cremating them,

[1] See, *e.g.*, 151 Conn. 728, 732, 733, 734; 153 Conn. 733, 740 744.

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and to establish the husband as the murderer of the deceased.

Following the unsuccessful termination of the state court litigation, petitioner, as counsel, filed the complaint in the action of *Tkaczyk* v. *Gallagher, et al.* in the District Court for the District of Connecticut (Pet. App. 2, p. A–22). That complaint named seven Connecticut judges, including all five members of the Supreme Court of Errors, as defendants, and alleged, *inter alia,* that each of those judges and several unnamed judges had been involved in a conspiracy against plaintiffs. Thus the complaint charged that "the * * * defendants [including the judges] conspired and agreed together, each in his own particular field and time for action, * * * to defraud and deceive the plaintiffs and to conceal and suppress the true cause of * * * the * * * death of * * * Olga Gallagher" (Pet. App. 2, p. A–24). It also alleged that certain Superior Court judges, certain State Supreme Court justices and one probate judge "entered into the conspiracy to conceal the murder and perform overt acts of their own * * *" (Pet. App. 2, p. A–28). In pursuance of the "conspiracy", the members of the State Supreme Court of Errors were asserted to have "listened to a string of falsehoods related to them in open court", and "knowingly used them to fabricate a false charge against the plaintiffs of failing to use due diligence in prosecution of their appeal, which they knew was not true * * *" (Pet. App. 2, p. A–35). The complaint also charged that a "transcript disclosed a Superior Court judge aiding and abetting [another defendant] in attempted subornation of perjury and an

attempt to extort a ransom under false pretenses" (Pet. App. 2, p. A–35).

The district court dismissed the action, holding that, in the circumstances, the complaint failed to present a substantial federal question. *Tkaczyk* v. *Gallagher*, 259 F. Supp. 584 (D. Conn.). An appeal from that decision was dismissed from the bench one week later by the Court of Appeals for the Second Circuit.[2] *Ibid.* The order of dismissal by the district court directed the United States Attorney to conduct an investigation to determine whether there had been a breach of professional conduct by petitioner such as to warrant disciplinary action. *Id.* at 587.

The United States Attorney conducted an investigation, including an interview with petitioner, and submitted a report to the court (Pet. App. 2, p. A–14 *et seq.*). That report noted that the complaint filed by petitioner had gone far beyond the claim that the state judicial action was erroneous, and had specifically accused state judges of criminal conduct (Pet. App. 2, p. A–18). Petitioner had advised the United States Attorney that he had no evidence upon which to base his allegations other than the public record of the state court case brought by his clients. *Ibid.* The allegation as to Superior Court Judge Coles' aiding and abetting attempted subornation of perjury and attempting to extort a ransom under false pretenses was based upon the transcript of a hearing before that judge on October 25, 1963. At that time,

[2] A later attempt to amend the pleadings by making them more specific was denied. *Tkaczyk* v. *Gallagher*, 265 F. Supp. 791 (D. Conn.).

Mr. and Mrs. Tkaczyk had filed a motion *pro se* seeking to have the attorney for their daughter's husband enjoined from taking certain action in connection with the primary litigation, which was then on appeal, and also disciplined for certain alleged unprofessional conduct. The allegations against the attorney were based upon an earlier offer of settlement, through the attorney, in which the husband offered to agree to an underground burial of the daughter's body if the Tkaczyks would pay the burial expense and state on the record that their extensive claims and allegations were untrue. Judge Coles denied the relief sought solely on the ground that it would be improper to take any action with respect to matters which were the subject of a pending appeal to the State Supreme Court of Errors.[3] Petitioner explained that the "attempt to extort a ransom" referred to the settlement proposal calling for the payment of burial expenses, and that the "attempted subornation of perjury" referred to the settlement proposal calling for the recantation of previous allegations. Judge Coles' action in denying the motion was the action referred to as "aiding and abetting DeAndrade in attempting subornation of perjury and an attempt to extort a ransom" (Pet. App. 2, p. A–19).

After receiving the report from the United States Attorney, the district court issued an order to petitioner to show cause why disciplinary action should not be taken against him (Pet. App. 2, p. A–12).

[3] The relevant portions of that transcript are reproduced at Pet. App. 2, pp. A–58, A–60.

Petitioner answered (Pet. App. 2, p. A–40), repeating certain of his allegations against the state court judges (*e.g.*, Pet. App. 2, p. A–43), and attempting to file a counterclaim (Pet. App. 2, p. A–52) against District Judges Timbers and Blumenfeld based on:

> [A] conspiracy between the two defendants to seize a jurisdiction they could not help knowing they did not possess, [in initiating] Disciplinary Action No. 11,798 against respondent when they knew the charges were false and intended to pervert justice in order to protect their friends and social and business associates from such ignominy as they had earned by civil misbehavior in state courts, caring nothing about justice for the respondent or his clients * * * [Pet. App. 2, p. A–53].

Petitioner sought damages on his "counterclaim"[4] of $35,000,

> but nothing for pain and suffering, because he rather enjoyed observing the behavior of presumably highly intelligent persons behave so outrageously when all of a sudden the civil misbehavior of their friends was brought to light by Complaint 11551 [Pet. App. 2, p. A–53].

At the hearing on the disciplinary proceeding, petitioner was given an opportunity to present any evidence he might have as to the charges he had made, but declined to do so (Pet. App. 2, pp. A–54, A–55).

The district court, noting that petitioner had offered

[4] Apparently, it was the refusal of the district court to hear his "counterclaim" and similar "motions" which gave rise to petitioner's allegations about refusal to apply the Federal Rules of Civil Procedure (Pet. 22–24).

no evidence other than the public record for making his accusations, and that the public record did not at all support the allegations, ordered petitioner disbarred (Pet. App. 2, pp. A–8, A–10). In the course of his appeal to the Second Circuit, petitioner repeated his allegations about the state court judges (*e.g.*, Pet. App. 2, pp. 4–6) and made additional charges of "criminal misbehavior" and "perjury" with respect to District Judge Blumenfeld (Pet. App. 2, pp. 8–10). The court of appeals affirmed, 386 F. 2d 805 (Pet. App. AP–1), holding that the district court was justified in finding that "these grossly disrespectful allegations, repeatedly made, were so totally unfounded and so clearly in violation of the Canons of Professional Ethics as to justify disbarment." 386 F. 2d at 806 (Pet. App. AP–2). It noted, however, that it would not object if the district court considered it appropriate to modify its judgment and suspend petitioner rather than disbar him. *Ibid.*

In his petition to this Court, petitioner again repeats his charges against the state court judges (*e.g.*, Pet. 7, 8, 12, 18–19), and also charges that Chief Judge Timbers of the District Court for the District of Connecticut

> has given every indication of becoming a conspirator with the 8 State Judges to continue the conspiracy of concealment of the murder facts and of the evasion of the constitutional rights to immediate underground burial [Pet. 8].

In addition, petitioner makes allegations of "perjury", and "corruption" (Pet. 13), apparently with respect

both to state and federal courts, without citing any evidence to support those charges.

Petitioner has not been deprived of rights guaranteed by the Constitution. As the court of appeals noted, the grossly disrespectful allegations, repeatedly made by petitioner, were so totally unfounded and so clearly in violation of the Canons of Ethics as to justify disbarment. And as that court also pointed out, "it is clear that in addition his conduct in presenting these wholly unsupported charges is such as to put in doubt his ability to exercise the judgment which advocacy requires." 386 F. 2d at 806 (Pet. App. AP–2).

This is an unhappy situation. Petitioner is a venerable lawyer. The suggestion of the court of appeals that suspension rather than disbarment would be appropriate seems to have merit. It is clear, however, that the courts below were warranted in the actions they have taken, and there is no basis for further review by this Court.

Respectfully submitted.

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Solicitor General.

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